SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO., et al., Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652813/2012 Hon. Andrea Masley Motion Sequence No.: 22
DISCOVER PROPERTY & CASUALTY COMPANY, et al., Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652933/2012 Hon. Andrea Masley Motion Sequence No.: 23

REPLY MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE FOR A PROTECTIVE ORDER AND A TEMPORARY RESTRAINING ORDER

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The Non-Party Teams[1] respectfully submit this reply memorandum of law in further support of their motion for a protective order pursuant to CPLR § 3103(a) and a TRO pursuant to CPLR § 6301.

PRELIMINARY STATEMENT

Without ever asking the Non-Party Teams if they would agree to collectively resolve all Subpoena-related disputes in New York, the Insurers embarked on a scorched-earth litigation process by filing and/or stating their intent to file 32 separate motions in 22 states, including New York, to compel compliance with 32 nearly identical Subpoenas. As this Court recognized, the obvious intent of engaging in this extraordinarily costly, inefficient and burdensome process is to (a) punish the Non-Party Teams for forcing the Insurers to properly serve their Subpoenas, and (b) avoid the efficient resolution of all Subpoena-related issues before this Court, which has sole jurisdiction over the matter and is the forum in which the Insurers, themselves, chose to litigate. The Insurers fail to cite a single case where any court sanctioned a party's attempt to force non-parties to litigate in dozens of foreign jurisdictions that know nothing about the case where such non-parties agreed to resolve all issues before the court handling the underlying dispute. That is because such a result makes no sense.

The Insurers simply claim they have an unrestricted *right* to impose on judges from Denver to Kansas City to Philadelphia an obligation to decide matters relating solely to this New York action and that this Court cannot restrain them. But that is not correct. The Insurers do not have an unfettered right to employ a highly burdensome and costly discovery tactic on the non-

[1] Unless otherwise defined herein, all defined terms have the meanings ascribed to them in the Non-Party Teams' moving papers.

Party Teams and avoid the efficient and orderly administration of discovery disputes by this Court simply because they believe it is in their "best interest" (Opp. 14) to do so. Rather, under well settled authority, this Court has broad discretion to restrain a party from such discovery tactics to avoid waste of judicial resources and harassment of non-parties, particularly where that tactic serves no legitimate purpose.

The following undisputed facts support the Non-Party Teams' right to a protective order:

- the Insurers chose *this Court* to litigate their insurance coverage obligations;
- the Insurers aggressively sought to, and succeeded in, preventing the NFL from litigating coverage issues in California or other foreign jurisdictions;
- the Insurers issued 32 nearly identical subpoenas to each of the Non-Party Teams in connection with an action pending in *this Court*, and under the color of *this Court's* authority;
- the motions to compel compliance with the Subpoenas issued to the Giants and Bills will be litigated before *this Court,* which will decide the same issues the Insurers insist on presenting in foreign jurisdictions;
- if the Insurers are permitted to litigate the same Subpoena issues nationwide, there is a significant risk of inconsistent rulings particularly on privilege and relevance issues;
- litigating the motions before *this Court* is clearly the most efficient and orderly way to resolve any outstanding discovery issues; and
- all of the Non-Party Teams have agreed to have this Court rule on and to be bound by this Court's rulings on the subpoenas.

The Insurers, without citing any support, claim this Court somehow lacks the right to manage its own litigation or to restrain their scorched-earth litigation tactics. However, this

Court's authority to do so is clear. The plain language of CPLR § 3103 permits this Court to issue protective orders, even "on its own initiative," to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person" (including non-parties, such as the Non-Party Teams) or "the courts" (including courts in New York and beyond). The Insurers' strategy falls squarely within the plain terms of the statute. The filing of 32 identical actions in 22 separate states, all of which emanate directly from an action pending exclusively in this Court, despite the Non-Party Teams' agreement to submit to this Court's jurisdiction to resolve all Subpoena-related issues, is precisely the kind of wasteful and abusive litigation tactic that CPLR § 3103 was designed to prevent. The foreign courts undoubtedly would prefer to defer to this Court to determine where the motions should be litigated and how issues such as relevance and privilege – issues that are already currently being fiercely litigated between the parties and that with respect to the parties have already been carefully considered by the Special Referee assigned to oversee discovery in this case – should be decided.

While the Insurers are seeking to pursue motions to compel across the United States, the Non-Party Teams are diligently, and in good faith, producing documents demanded in the Subpoenas. In fact, the Non-Party Teams are engaged in a thorough and extensive document collection, review and production process involving thousands of attorney hours, and resulting in the production, to date, of 4,631 responsive documents consisting of 16,519 pages of material from 39 custodians. (*See* Reply Affirmation of Esther N. Birnbaum, dated June 7, 2019 ("Birnbaum Aff.") ¶ 8.) Production efforts are continuing in full force, with the Non-Party Teams expecting to make a significant, supplemental production from an additional 23 custodians on or before June 12, 2019, and to complete the production as soon as practicable. (*Id.* ¶¶ 9-10.)

In their opposition, the Insurers erroneously contend that the Non-Party Teams are not entitled to a protective order or a TRO because they cannot show undue burden or prejudice. This contention is belied by the Insurers' inability to articulate any legitimate rationale for pursuing nationwide litigation even though the non-parties from whom they are seeking discovery are willing to submit to the jurisdiction of this Court. As set forth in the Non-Party's moving papers, during the April 29, 2019 oral argument, and as discussed in more detail herein, forcing the Non-Party Teams to litigate identical issues in multiple jurisdictions across the country is incredibly burdensome and prejudicial, wasteful of judicial and other resources (including the resources of foreign courts), and creates a strong likelihood of inconsistent rulings, confusion, and unnecessary litigation. For these reasons, and to protect this Court's authority to exercise its most basic function as a judicial body – to manage the matters before it consistently, efficiently and in an orderly manner – the Non-Party Teams' motions should be granted in their entirety.

ARGUMENT

I. This Court Has Authority To Issue A Protective Order Pursuant to CPLR § 3103 To Protect Its Power To Manage Its Own Litigation

It is axiomatic that courts have the authority to manage the litigations pending before them, and have various tools at their disposal to ensure that matters proceed in an orderly and efficient manner. One such tool is the authority to issue protective orders. *See* N.Y. C.P.L.R. § 3103(a); *In re Estate of Souza*, 80 A.D.3d 446, 4462011 N.Y. Slip Op. 00033 (1st Dep't 2011); *Jones v. Maples*, 257 A.D.2d 53, 56-57, 1999 N.Y. Slip Op. 05432 (1st Dep't 1999); *Barouh Eaton Allen Corp. v. Int'l Bus. Machs. Corp.*, 76 A.D.2d 873, 874 (2d Dep't 1980) ("When the disclosure process is used to harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper."). In particular, CPLR § 3103(a) provides that:

> The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

By its plain language, CPLR § 3103 permits courts to exercise control over the discovery devices used in the matters before them by authorizing them to impose protective orders *sua sponte*, even before a party or non-party seeks relief. *See Bligen v. Markland Estates, Inc.*, 6 A.D.3d 371, 372, 2004 N.Y. Slip Op. 02524 (2d Dep't 2004); *Helie v. McDermott, Will & Emery*, 18 Misc. 3d 673, 684, 2007 N.Y. Slip Op. 27523 (Sup. Ct. N.Y. Cnty. 2007); *Bolshakov v. McCarthy*, 182 Misc. 2d 477, 479, 1999 N.Y. Slip Op. 99525 (N.Y.C. Civ. Ct. 1999).

The reason for this is obvious: management of any litigation requires that the overseeing court have the power to assert control over the matter, and ensure that it proceeds in an orderly, efficient and consistent manner. The state and federal cases previously cited by the Non-Party Teams and the NFL recognize this most basic principle. The state cases recognize the authority of the "court which has the underlying case . . . to make the threshold determination as to whether to permit [ ] discovery" because of its familiarity with, and interest in, the matter. *See In re Welch*, 183 Misc. 2d 890, 891, 2000 N.Y. Slip Op. 20147 (Sup. Ct. N.Y. Cnty. 2000)); *In re Land*, 22 Misc. 3d 1117(A), 2009 N.Y. Slip Op. 50157(U), 2009 WL 241728, at *4 (Sup. Ct. N.Y. Cnty. 2009); *In re Kerr*, 16 Misc. 3d 1028, 1032, 2007 N.Y. Slip Op. 27298 (Sup. Ct. N.Y. Cnty. 2007). Indeed, the Insurers' attempt to seek an alternative forum that is "less familiar with the [underlying] action and any applicable [New York] law," would "exemplif[y] procedural game playing at its worst." *Kerr*, 16 Misc. 3d at 1031-32. The instant matter is precisely the type of scenario requiring the Court to exercise its well-recognized authority.

The Insurers' attempt to distinguish the federal cases cite is equally unavailing. Like the state cases, *F.D.I.C. v. Axis Reinsurance Co.*, No. 13 Misc. 380 (KPF), 2014 WL 260586

(S.D.N.Y. Jan. 23, 2014) and *Stanziale v. Pepper Hamilton LLP*, No. M8-85 (Part I) (CSH), 2007 WL 473703 (S.D.N.Y. Feb. 9, 2007), recognize that courts have the authority to require parties to litigate discovery issues in the forum of the *underlying proceeding* because the court most familiar with the facts of the case is best situated to manage discovery issues in the "interests of justice and judicial economy." *Stanziale*, 2007 WL 473703, at *4-5 (explaining that a "judge who is fully familiar with the underlying litigation is in a better position to resolve such issues [of privilege and relevance] than a judge in a different district with no knowledge of the case"). They also recognize that there is a significant danger in having foreign jurisdictions reach "different and contradictory holdings" that "hamstring [the court of the underlying action in its] ability to control and delineate the parameters of discovery." *F.D.I.C.*, 2014 WL 260586, at *2 (finding that "considerations of judicial efficiency and comity" require the district court presiding over the underlying action to decide discovery disputes).

The Insurers' attempt to distinguish these federal cases because they supposedly apply Fed. R. Civ. P. 45(f) misses the point. Several of these cases were decided before that provision was even promulgated. Instead, those rulings – like the relief sought by the Non-Party's here – were based on the inherent power of the courts to control their dockets and manage the litigations before them. *See F.D.I.C.*, 2014 WL 260586, at *3 (noting that judges had transferred motions to compel to the underlying court before Rule 45(f) took effect); *Stanziale*, 2007 WL 473703, at *3-5 (collecting pre-Rule 45(f) cases for the proposition that courts have routinely transferred motions to compel to the underlying court to serve the interests of justice and judicial economy). Moreover, these cases stand for the non-controversial proposition that the court with jurisdiction over the underlying matter is best situated to decide discovery disputes including privilege and relevance. This proposition is indisputable.

The Insurers argue in their response brief that "it is not up to this Court . . . to direct the Insurers' approach to litigation." (Opp. 14.) But, it is absolutely "up to this Court" to "find a way to organize" this "large unwieldy case" (*see* Affidavit of Seth B. Schafler, dated June 7, 2019 ("Schafler Aff.") Ex. C (Tr. 27:3-5)), including by making basic decisions about discovery. This Court has been diligent about ensuring that this litigation proceeds in an orderly manner, by, for example, appointing a Special Master to help manage the case, including discovery issues. The Insurers seek to undermine the Court's efforts to efficiently manage this litigation merely because that is somehow "in [the Insurers'] best interest." (Opp. 14.) [2]

II. This Court Is Authorized To Issue a Protective Order To Protect The Non-Parties Teams And Foreign Courts From Undue Burden and Prejudice

The Insurers' opposition is premised on a strawman argument that the Non-Party Teams somehow *forced* them to litigate nationwide. That is simply not true. At no time in the months prior to filing their duplicative motions across the country did the Insurers ever contact counsel for the Non-Party Teams to ask if they would agree to submit all discovery disputes to this Court. If they had done so, the Non-Party Teams would have agreed, as they do now. Instead, the Insurers unilaterally chose to initiate a nationwide wave of litigation, blame it on the Non-Party Teams, and refuse to stand down despite the Non-Party Teams' offer to consolidate all issues before this Court. They have only themselves to blame for the costs they unnecessarily chose to incur.

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[2] In addition, the Insurers successfully sought to stay the NFL's California action to ensure that all litigation over coverage related issue occur before this Court in New York. (Schafler Aff. Ex. A).

Moreover, the Insurers rely on a misguided view that the merits of this motion must be viewed solely from the perspective of each of the Non-Party Teams viewed as wholly separate, and distinct corporate entities. They ignore the broad scope of CPLR § 3103, which allows this Court to view the litigation as a whole and take into consideration the impact of the Insurers' duplicative litigation strategy on the parties, non-parties and the courts, including those in foreign jurisdictions. The contention that this is solely for the convenience of the Non-Party Teams' lawyers is obviously untrue and merely a diversion to avoid scrutiny of the burden the Insurers' strategy imposes on the courts, the parties and non-parties, as well as the risk of inconsistent decisions.[3] The Non-Party Teams consented to the jurisdiction of this Court – the court with exclusive authority over the case – to ensure that outstanding discovery issues are resolved in the most efficient, orderly and consistent way possible. That this is the most efficient way to proceed is incontrovertible.

These excessive burdens that the Insurers' foreign litigation strategy would impose on everyone concerned are indisputable. If permitted to litigate identical discovery issues in numerous courts across the country, the Non-Party Teams would be required to appear, file briefs and make arguments in multiple proceedings before different judges, none of whom have this Court's background, knowledge or understanding of how the non-party discovery issues fit

[3] Demonstrating the Insurers' desire to inflict unnecessary costs on the Non-Party Teams and foreign courts, the Insurers have not even attempted to consolidate actions within a given state. For example, the Insurers filed three separate motions to compel compliance with the subpoenas in Florida against the Buccaneers, Jaguars and Dolphins in two separate actions, which would require multiple Florida courts to make rulings on identical issues.

into the larger case. Not only is this a waste of the Non-Party Teams' time and resources, and a recipe for inconsistent determinations, but it is also unfair to the foreign courts who will be forced to expend precious judicial resources mastering issues and making rulings on discovery disputes that are unconnected to any matter before that court. The foreign courts before whom the motions to compel are now pending are surely amenable to having this Court decide all issues related to the subpoenas. In fact, as noted above, when the parties advised those courts of the voluntary TRO entered by this Court, not a single foreign court required the parties to appear on the motions pending before those courts. And, of course, the decision of whether to permit the Insurers to proceed in courts nationwide is of particular importance to foreign courts because the Insurers, for unstated reasons, anticipate "multiple discovery disputes" (Opp. 13) with the Non-Party Teams. The resolution of such anticipated and "multiple . . . disputes" would further burden foreign courts who have no interest in, or understanding of, the underlying litigation.

Notwithstanding the logic and efficiency of requiring the Insurers to pursue their motions to compel in this Court, the Insurers argue, without citing a single case, that "the most appropriate forum for litigating any discovery dispute arising from any subpoena is the state in which that subpoena was issued," and that this approach is in their best interests. (Opp. 13-14.) This argument is meritless. It would not be efficient or in the best interests of anyone to conduct 32 proceedings in 22 different states particularly where, as here, the Non-Party Teams have already produced thousands of responsive documents and have agreed to resolve all discovery disputes before this Court. (Birnbaum Aff. ¶¶ 4-8; *see also* Schafler Aff. Ex. B.) Indeed, the Court recognized the efficiency of consolidation in New York when it asked the Insurers "I am not sure what your objection is. Why not just take care of everything here?" (Schafler Aff. Ex. C (Tr. 9:20-21).)

Far from serving as the most expedient way to attain the discovery they seek, the Insurers' motions to compel merely function to punish the Non-Party Teams, as this Court rightly recognized. (*Id.* at 9:24-10:1 ("So that is the point. Now you are punishing them because the NFL wouldn't agree.")) This Court should not countenance such tactics, especially where, as this Court has acknowledged, the Non-Party Teams "want to be within this jurisdiction and do everything in one place which seems efficient." (*Id.* at 9:18-20.) *See also Kerr*, 16 Misc. 3d at 1031-32 (noting that efforts to inflict greater litigation costs or to seek an alternative forum that is "less familiar with the [underlying] action and any applicable [New York] law . . . exemplif[y] procedural game playing at its worst"); *see also Auerbach v. Klein*, 30 A.D.3d 451, 452 (2d Dep't 2006); *Del Gallo v. City of New York*, 43 Misc. 3d 1235(A), 2014 N.Y. Slip Op. 50929(U), 2014 WL 2745696, at *7, *8 (Sup. Ct. N.Y. Cnty. 2014); *Reyniak v. Barnstead Int'l*, 27 Misc. 3d 1212(A), 2010 N.Y. Slip Op. 50689(U), 2010 WL 1568424, at *3 (Sup. Ct. N.Y. Cnty. 2010).[4]

In addition to the undue burden of having to litigate identical issues in multiple jurisdictions, the Non-Party Teams are at risk of prejudice resulting from inconsistent rulings. A stark example of this risk relates to privilege issues, about which the Insurers are speaking from both sides of their mouths. During the April 29, 2019 hearing, the Insurers assured the NFL, the

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[4] At the April 29, 2019 hearing, the Court offered another viable solution to the present dispute, to which the Non-Party Teams did not object. Specifically, the Court offered to "adjudicate the issues with the Giants and Bills" with the Non-Party Teams "go[ing] along with whatever the rulings are in those cases." (Schafler Aff. Ex. C (Tr. 23:21-24).) Once again, the Insurers refused, without citing any reason other than their supposed "entitlement."

Non-Party Teams and this Court that they were not seeking the production of privileged documents ("every single one of the motions we filed to dates has [a] . . . proposed order that only seeks to compel them to produce non-privileged documents. We just want them to produce what they feel is not privileged"). (Schafler Aff. Ex. C (Tr. 15:23-16:2).) In an about-face, the Insurers argue in a footnote in their opposition that the privilege that attaches to the NFL parties' "defense file" privilege would be "destroyed" if the NFL parties disclosed such privileged information to the Non-Party Teams.[5] (Opp. at 21 n.8.) When asked by this Court how the Insurers propose resolving privilege disputes, they responded, "[i]f there is a fight that remains after that, we could deal with that." (Schafler Aff. Ex. C (Tr. 16:2-3).) This answer confirms the Insurers' intent to march into 32 different courts all over the country hoping to obtain a single favorable ruling requiring one of the Non-Party Teams to produce documents covered by common-interest privilege. The Insurers would then improperly attempt to convince unfamiliar

[5] Notably, the Insurers do not cite a single case or articulate any basis to support this baseless contention. The NFL is a membership association consisting of its 32 Non-Party Teams, and NFLP's ultimate shareholders are the Non-Party Teams. The NFL parties and its Non-Party Teams have always had a shared interest in defending against the underlying plaintiffs' claims in the concussion litigation in order to minimize any potential liability. That common interest, and the relationship between the NFL parties and its member teams, protects voluntarily shared information from any assertion of privilege waiver. *Liberman v. Gelstein*, 80 N.Y.2d 429, 437 (1992); *Kindred Healthcare, Inc. v. SAI Glob. Compliance, Inc.*, 169 A.D.3d 517, 517, 2019 N.Y. Slip Op. 01164 (1st Dep't 2019); *Ashby v. ALM Media, LLC*, 110 A.D.3d 459, 459, 2013 N.Y. Slip Op. 06497 (1st Dep't 2013). Such protection is well established.

courts in other jurisdictions to require the Non-Party Teams to produce the same privileged documents based on that erroneous ruling. This is an untenable result that should be prevented through the imposition of a protective order, which would allow this Court to make privilege and relevance rulings to apply consistently across the case.

III. A Temporary Restraining Order Is Appropriate

In their opposition, the Insurers claim that the Non-Party Teams have failed to establish the necessary prerequisites to obtain injunctive relief in accordance with CPLR § 6301. For the reasons set forth in Section II of the Non-Party Teams' moving brief, and the accompanying Affirmation of Irreparable Harm, and by counsel at oral argument before this Court, the Non-Party Teams have shown (1) a likelihood of success on the merits; (2) irreparable injury if the injunction is not granted; and (3) a balance of the equities in their favor. And contrary to the Insurers' misrepresentation of the record, this Court did not already rule otherwise. (Opp. 19-20.)

At the very least, the Non-Party Teams respectfully request that the TRO stay in effect pending the Court's decision on the protective order. If this Court were to allow the TRO to expire prior to a ruling on the protective order, the Insurers would be free to immediately pursue their motions to compel litigation across the country, thereby undermining any eventual entry of a protective order by this Court. Alternatively, the Non-Party Teams suggest that the Court implement its own proposal of first deciding discovery issues related to the Giants and Bills, after which all of the Non-Party Teams would abide by such rulings.

CONCLUSION

For all of the foregoing reasons, the Non-Party Teams respectfully request that the Court grant their motion in its entirety.

Dated: New York, New York
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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I certify that this affirmation complies with the 4,200-word limit under Commercial Division Rule 17. This computer generated memorandum of law was prepared using Microsoft Word, and based on Microsoft Word's word count function, the total number of words in this memorandum of law, including of point headings and footnotes and exclusive of the caption and signature block is 4,148.

Dated: April 26, 2019

SETH B. SCHAFLER